UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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DENNIS J. DONOGHUE, ET AL.,

Plaintiffs,

v. 23 CV 4985 (JHR)

ANTARA CAPITAL MASTER FUND LP, ET AL.,

Defendants.

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New York, N.Y.
May 2, 2024
1:15 p.m.

Before:

HON. JENNIFER H. REARDEN,

District Judge

APPEARANCES

MIRIAM TAUBER LAW
Attorneys for Plaintiff
BY: MIRIAM D. TAUBER

LAW OFFICE OF DAVID LOPEZ
Attorneys for Plaintiff
BY: DAVID LOPEZ

AKIN GUMP STRAUSS HAUER & FELD LLP
Attorneys for Defendant
BY: KAITLIN D. SHAPIRO

(Case called)

MR. LOPEZ: David Lopez, for the plaintiff.

MS. TAUBER: Miriam Tauber, for the plaintiff.

MR. HUNTER: James Hunt, for nominal defendant, AMC Entertainment Holdings Inc. and Josh Amsell, also for nominal defendant AMC.

MS. SHAPIRO: Kaitlin Shapiro, for the Antara defendants.

MR. RAPPAPORT: Douglas Rappaport, for the Antara defendants.

THE COURT: Got you. Thank you.

All right. We are here today, of course, for a fairness hearing. Before me is an application for approval of the shareholder settlement, which includes an award of attorneys' fees.

We are here today for a fairness hearing. Before me is an application for approval of a shareholder settlement, which includes an award of attorneys' fees.

The proposed settlement disposes of the claims brought by plaintiffs Dennis Donoghue and Mark Rubenstein on behalf of Nominal Defendant AMC Entertainment Holdings, Inc. ("AMC" for short) against defendants Antara Capital Master Fund LP; Antara Capital Fund GP LLC; Antara Capital; Antara Capital GP LLC; and Himanshu Gulati (I will refer to all of these collectively as the "Antara Defendants"). In sum and substance, plaintiffs, who

are security owners of AMC, brought this action on AMC's behalf under Section 16(b) of the Securities Exchange Act of 1934 to recover quote "short-swing" profit that the defendants allegedly realized from trading in AMC's equity securities. On September 11, 2023, the parties finalized a Stipulation of Settlement, which was signed and filed with the Court on September 13, 2023.

Against this backdrop, plaintiffs moved for preliminary approval of the settlement, which this Court granted in an order issued on March 8, 2024. In that Order, the Court also directed AMC to give notice to securityholders of the proposed settlement, of the settlement hearing, and of the right to appear; and scheduled this final approval hearing.

In accordance with that Order, on March 12, 2024, AMC published notice of the settlement on the investor relations portion of its website; it filed the notice as an exhibit to a Form 8-K with the SEC; and it issued a press release published through the Business Wire financial news service.

I also note that one objection was noticed as of April 18, 2024, which was the deadline for submission of any objections.

In connection with today's hearing, I have before me, among other materials, the following:

The Stipulation of Settlement dated September 11, 2023 and filed on September 13, 2023;

AMC's motion for final settlement approval;

The declaration of James A. Hunter in support of AMC’s motion, and the exhibits attached thereto;

AMC’s memorandum of law in support of its motion;

Plaintiffs’ memorandum of law in support of AMC’s motion; and

A Proposed Order and Final Judgment, which was appended as an exhibit to the Stipulation of Settlement.

I do not believe that I am in receipt of any opposition papers. So, it is my understanding that the Antara defendants do not oppose the motion.

Do any of the parties wish to add anything before I proceed further.

Before I issue a ruling, let me turn back to the matter of objections. As I noted, as of April 18, one objection had been made, by Philip Goldstein. That was filed on the docket as ECF No. 42-6.

Is there anyone here today for the objector who would like to be heard?

MR. GOLDSTEIN: Yes. I am Phillip Goldstein.

THE COURT: All right. Mr. Goldstein, if you would go to the podium, please.

MR. GOLDSTEIN: Thank you, your Honor.

I'm here not to object to the merits of the settlement, but rather to question the jurisdiction of the Court to consider any action in this case. I'm a little

nervous because I'm not an attorney. You'll forgive me if I read most of what I have to say.

THE COURT: That is quite all right.

MR. GOLDSTEIN: So, Rule 12(h)(3) of the Federal Rules of Civil Procedure states: If the Court at any time determines that it lacks subject matter jurisdiction, the court must dismiss the action. Moreover, the federal courts are under an independent obligation to examine their own jurisdiction and standing is perhaps the most important of the jurisdictional doctrine is what the Supreme Court has stated.

This special obligation of every federal court to satisfy itself of its own jurisdiction is not waived, even though the parties are prepared as they are here to concede it, apparently, since they've already agreed to this settlement.

So, to establish Article III standing, a plaintiff must show that it suffered an injury in fact that is concrete, particularized and actual or imminent that is not conjectural or hypothetical.

Second, that the injury was likely caused by the defendant.

And third, that the injury would likely be redressed by judicial relief.

This long-standing doctrine of the Supreme Court was re-enforced in an important case, Transunion versus Ramirez, in 2021. And that's going to come into play, I think, in your

consideration.

By the way, a particularized injury must affect the plaintiff in a personal and individual way. So, in Transunion, the Supreme Court distinguished between two classes of plaintiffs, both of which had a cause of action authorized by the Fair Credit Reporting Act. Those that suffered a concrete injury resulting from the alleged violation of the statute by the defendant and those that did not and hence, lacked standing. Transunion made it clear that standing requires both, one, a cause of action that is injury in the law, which Section 16 certainly provides; and two, a concrete and particularized injury or an injury in fact.

By contrast, in an earlier case, Donoghue versus Bulldog Investors, apparently, Mr. Donoghue is a serial plaintiff in Section 16(B) cases. So, I guess I'll just refer to it as "Bulldog". In 2012, the Second Circuit held that every violation of Section 16(B) constitutes an injury of fact to the insurer even if the issuer did not allege a concrete and particularized injury. The Court reasoned that Section 16(B) effectively imposes a fiduciary duty upon every ten percent owner of a company stock to refrain that short-swing trading, and second, that that fiduciary duty endows the company with an enforceable legal right to expect such owner not to engage in short-swing trading. And therefore, if such trades were made, the deprivation of that right is an injury in fact sufficient

for Article III standing.

But cases that were brought under federal statutes in the past, they may not have been scrutinized sufficiently for Article III standing are now viewed through the lens of Transunion. In one such case, Packer versus Raging Capital, brought in the Eastern District of New York to enforce Section 16(B), in this case, as in this case, the plaintiff did not allege any actual economic or other harm to the issuer. Consequently, Magistrate Judge Wicks, of the Eastern District, dismissed the case for lack of standing citing, among other cases, a Second Circuit case in 2022 Hardy versus West Point Realty. And the quote from that case is last term, meaning referring to Transunion, "last term the Supreme Court in Transunion clarified that a plaintiff has standing to bring a claim for monetary damages following a statutory violation only when he can show a current or past harm beyond the statutory violation itself".

Packer has been appealed with the only issue being whether Bulldog is still good law. Oral argument in the Second Circuit is scheduled for next week, next Tuesday, actually, May 6. So, it's coming right on the heels of this case.

So, the two points I would want to elaborate on is, number one, Section 16(B) does not make a ten percent stockholder a fiduciary. As I said, Donoghue versus Bulldog, was premised on its finding of injury and fact whenever 16(B)

is violated. That holding was based on what the Second Circuit panel said was quote, recognition by another earlier panel Ratz versus Clouten, back in 1951, that Section 16(B) effectively makes ten percent beneficial owners fiduciaries as directors and officers were anyway, at least to the extent of making all short-swing transactions by such persons in the issuer's stock breaches of trust.

However, Donoghue failed to site or distinguish a 1968 labor decision, Second Circuit decision Weill versus Rayet Faberge, in which the court stated that "Any section 16(B) award to the corporation is essentially a windfall, since the corporation has suffered no harm for which it is being recompensed."

I submit that Donoghue's labeling every noncontrolling stockholder of a corporation a fiduciary is unwarranted. In this regard I'd like to raise several points. The full disclosure. I am the principal of Bulldog. I was there. I am familiar with all the court filings in that case and I attended the oral argument.

First of all, we were blind-sided by the ruling of the Second Circuit in that case because fiduciary duty was never raised at any time prior to its ruling by the plaintiff, the district court judge or the panel itself in oral argument. That's to me -- again, I'm not a lawyer but I'd like to fancy myself a pretty good amateur lawyer. But that seems like a

violation of our right to due process because we never had an opportunity to rebut that premises.

Secondly, the Second Circuit can unilaterally and I believe improperly, posited an injury in fact which is properly the burden of the plaintiff to establish.

In a case just decided about a month ago in the Tenth Circuit, fellowship v. Polis, the Court stated "It is the plaintiff's burden to establish jurisdiction and a federal court is not obliged to conjure up possible theories to support subject matter jurisdiction.

And that was a quote from a prior Tenth Circuit case from written by judge, now Justice Gorsuch, for a unanimous court. That case was Raley versus Hyundai Motor in 2011.

Third point is, the word "fiduciary" or its plural, appears 29 times in the 1934 Securities and Exchange Act. However, it does not appear in Section 16. And in 2019, the Second Circuit stated in that quote "the first cardinal cannon of statutory interpretation is to look at the text and it is only when a statute's text is ambiguous that we turn to other tools of statutory interpretation to help clarify the ambiguity." There is no ambiguity in Section 16 about making the ten percent stockholders fiduciaries. And as the Second Circuit also said, Congress does not hide elephants in mouse holes. By contrast, Title 29 U.S.C. Section 1104, which is the ERISA law, elaborates in great detail five very small-print

pages about the duties of an ERISA fiduciary.

Fourth point is, that just about 80 years ago, 1943, in a Supreme Court case, Securities and Exchange Commission versus Chanery, the Supreme Court rejected an allegation of breach of fiduciary duty by company directors, undisputed insiders and undisputed fiduciaries or trading based upon public information and noted that -- and here is the quote -- "The courts do not impose upon officers and directors of a corporation any fiduciary duty which precludes them from buying and selling the corporation's stock." The Donoghue court did not mention let alone attempt to reconcile its holding with Chanery.

Fifth point is, common law and case law are contrary to Donoghue v. Bulldog. Donoghue relied on a prior case which I mentioned, Ratz, quoting from Ratz as follows:

"A trustee with the power to sell trust property is under a duty not to sell to himself." Ratz was a 16(B) case. However, that's an analogy because, although -- and I'm going to quote from a Seventh Circuit case -- that's an inept analogy because although the general rule is the officers and directors cannot deal with the property of the corporation for their own personal benefit or advantage. This duty does not extend to the outstanding stock of the corporation for the reason that such stock is the individual property of the respective shareholders and not in any sense, the corporation's property.

The Donoghue v. Bulldog case cited a New York State case called Diamond v. Oreomuno, to support its conclusion about fiduciary duty. But the Seventh Circuit subsequent, after Diamond v. Oreomuno, said that that case, that New York State case was a departure from the traditional common law approach which was that a corporate insider did not ordinarily violate its fiduciary duty to the corporation by dealing in the corporation stock unless the corporation was thereby harmed.

That case was Freeman versus Vechium, Seventh Circuit 1978.

Sixth point and last point on fiduciary duty, the assertion that every violation of Section 16(B) is a breach of fiduciary duty is irreconcilable with the Supreme Court 16(B) case called foremost Makesum v. Providence Security, 1976, in which a unanimous Supreme Court expressed concern about 16(B) imposing "Liability without fault", to deem an act that is without fault to constitute a breach of fiduciary duty is an oxymoron. In a footnote the Court included the following excerpt from a senate hearing between Thomas G. Corcoran, a spokesman for 16(B)'s drafters and a Senator Keen.

I'm going to read you this brief excerpt.

Senator Keen said, I think it's all right to apply it to an officer or director but I think to require the ordinary investor. Then Mr. Corcoran says five percent is a lot. So you can see originally it was five percent and they moved the

level I guess up to ten percent. The bill was originally five percent. Five percent is a lot in a modern corporation. Many corporations are controlled by five to ten percent.

Senator Keen responds: They may own or they may sell it. This applies to all corporations. And you are getting down to the point where you are interfering with the individual a good deal here. I Agree with you with respect to officers and directors.

Mr. Corcoran responds: A stockholder owning five percent is much an insider as an officer or director. Whether he is a particular director or not, he normally is as a practical matter, a director.

Senator Keen says: He might not be.

Therefore, unlike the Donoghue court, which did not cite again foremost Makesum, it seems that at least one senator at the time did not think a ten percent stockholder was automatically a fiduciary.

But then the second point is even if Section 16(B) did expressly declare that every ten percent share holder is a fiduciary, which it does not as I said, that does not transform a breach of fiduciary duty from a legal injury into a concrete factual injury.

Indeed, as your Honor and every lawyer in this room surely knows, in order to establish a breach of fiduciary duty, the plaintiff must demonstrate, one, the existence of a

fiduciary relationship; two, the breach of that duty owed by the fiduciary to the plaintiff and more importantly; three, harm to the plaintiff. A breach of fiduciary duty may be harmless, in which case the plaintiff's claim fails.

Donoghue used judicial slight-of-hand to conflate a common law cause of action that is a breach of fiduciary duty and a factual injury stemming from the breach.

Transunion, which needs to be applied and I presume will be applied in the Raging Capital case, the Packer case on Tuesday, Transunion clarified that "Standing is not dispensed in gross. Rather, plaintiffs must demonstrate a concrete and particularized injury."

More important however, Transunion put an end to federal courts hearing claims based on non existent injuries regard less of historical pedigree. And Transunion, which used the historical analogue test does not suggest otherwise. That test asks whether a modern injury bears a close relationship to a harm, not a cause of action traditionally recognized by common law courts. It does not transform into a concrete factual injury what the common law has historically regarded as a legal injury. Put it differently, a historical record is no talisman and a fiduciary is not a magical record that eliminates the plaintiff's obligations to establish the existence of an injury in fact.

A historical analogical harm is necessary but not

sufficient to satisfy Article III's concreteness requirement. In sum, post-Transunion no longer is a legal injury sufficient to create standing. Under Article III, an injury in law is not an injury in fact and only those plaintiffs who have been concretely harmed by defendant may sue in federal court.

Now, I concede that there are those who disagree with what I've said. Among them are several judges in this district that have declined to agree with Judge Wick's view that Bulldog is inconsistent with Transunion. However, I refer the Court to perhaps a more important decision than Transunion, a 2020 decision by the U.S. Supreme Court that was not cited by Judge Wicks but that directly addresses the question of whether a breach of fiduciary duty, per se, constitutes an injury in fact.

In that case Thoe versus U.S. Bank, the plaintiffs who were participants in a defined benefit retirement plan, which is a type of pension plan which guarantees them a fixed payment each month regardless of the plan's value or its fiduciaries good or bad investments, these plaintiffs filed a lawsuit under ERISA, the Employer Retirement Income Security Act of 1974 alleging that the defendants, including U.S. Bank violated ERISA's duty of loyalty and prudence by purely investing the plan's access.

The solicitor general and the Department of Labor jointly file an amicus brief in which they asserted that,

quote, "An ERISA beneficiary has standing to sue a fiduciary that breaches its duties without the need to demonstrate any injury beyond the breach itself."

And four of those Supreme Court justices agree. They insisted that the participants in a pension plan incurred de facto injury from having the personal legal rights invaded, even absent financial harm. However, the five justices in the majority did not agree with the minority. And they held that "The fact that ERISA affords all participants, including defined benefit plan participants a cause of action to sue does not satisfy the injury and fact requirement here." And it's cited Spokeo to the effect, which is a former standing case prior to Transunion. Cited Spokeo to the effect that "Article III standing requires a concrete injury even in the context of a statutory violation. In other words, a plaintiff that would be no better off had the alleged statutory violation not occurred does not have an injury in fact, and in this case, no such actual injury has been alleged."

Therefore, in conclusion, I think the one thing we can all agree on, there's been a lot of talk from me about fiduciary duty is that every lower federal court, including this one, has a fiduciary duty to abide by the majority of the Supreme Court. Therefore, for the reasons I've articulated, I urge this Court to either dismiss this case for lack of standing or defer making any ruling until the Second Circuit

rules on the Packer appeal.

Thank you very much.

THE COURT: All right. Thank you, Mr. Goldstein.

I will address your objection when I give my ruling. I am going to proceed now to give you my ruling. Let me proceed now to my ruling.

As an initial matter, I have reviewed the proposed settlement under the standards set forth in the 2021 decision issued by Magistrate Judge Gorenstein and then adopted by Judge Carter, Revive Investing LLC v. FBC Holdings S.A.R.L., published at 2021 WL 56905. I will also note that various other courts in this district have since cited and referenced Revive Investing with approval. In that decision, Judge Gorenstein noted that courts have almost universally recognized that agreements purporting to resolve Section 16(b) proceedings must be scrutinized. To that end, Judge Gorenstein noted, some courts have scrutinized such agreements under the fair, reasonable and adequate standard of Federal Rule of Civil Procedure 23(e)(2); and others have used the standard that courts regularly have used in deciding whether the settlement of a derivative action should be approved. Relatedly, Judge Gorenstein pointed out, these courts have often considered the factors that are set forth in City of Detroit v. Grinnell Corporation, a Second Circuit decision from 1974, reported at 495 F.2d 448. And these factors include the following:

The risks of establishing liability;
The risks of proving damages; complexity, expense and likely duration of litigation;
The ability of defendants to withstand a greater judgment;
The range of reasonableness in light of the maximum possible recovery and range of reasonableness in light of all of the attendant risks of the litigation; and
The reaction of other shareholders to the settlement.
There has also been a potential additional factor identified in Section 16(b) settlements. That is identified as the congressional purpose to cause disgorgement of short-swing trading profits by corporate insiders, even when the corporation is unwilling to prosecute such a suit and a derivative plaintiff brings suit instead.

These factors, including this additional factor, are discussed at some length in the case of FTR Consulting Group ex rel. Cel-Sci Corp. v. Advantage Fund II Ltd., a 2005 SDNY decision that is contained at 2000 WL 2234039 and that is often cited by courts in this District.

So, I have considered these authorities, and other cases like them, together with the parties' papers and the objection by Mr. Goldstein). And based on that review, I will be granting the unopposed motion to approve the settlement.

Here, most, if not all, of these factors favor approval.

To begin, Plaintiffs faced not insignificant litigation

risks, for the reasons thoroughly explicated, in part, on pages 7-11 of AMC's papers.

I will note that, even if Plaintiff prevailed on liability, it is quite possible that they would recover less than the $27.25 million “maximum” profit, and it is quite likely that the maximum profit would be closer to $3.8 million.

In addition, there is substantial complexity and expense involved in short-swing profits cases, and the possibility of a lengthy and expensive trial favors settlement.

Moreover, the $3.3 million settlement still constitutes a large portion of the most likely possible recovery of $3.8 million.

Furthermore, AMC’s brief and the Hunter Declaration evince the thorough and robust investigation that was undertaken in connection with the claims brought here and the eventual proposed settlement.

As for the reaction of other shareholders to the settlement, the scant number of objectors—[a single objection, to be exact]—indicates that the settlement has been broadly received favorably.

The one objection that was noticed—specifically, from Philip Goldstein is overruled.

For one, the objection is defective. It is unsigned, which flouts Rule 11(a) of the Federal Rules of Civil Procedure. That Rule provides, in relevant part that, quote, “every pleading,

written motion, and other paper must be signed by at least one attorney of record in the attorney's name or by a party personally if the party is unrepresented.” In addition, to my Chambers’ knowledge, Mr. Goldstein's objection was not properly filed with the Court in accordance with my March 8 Order.

Putting these defects aside, Mr. Goldstein’s contention that the court lacks subject-matter jurisdiction over this matter is without merit. The Second Circuit has held that stockholder plaintiffs have Article III standing to pursue claims for recovery of profit under Section 16(b), and I am citing here to the 2012 decision, Donoghue v. Bulldog Investors General Partnership, published at 696 F.3d 170. Every court but one has concluded that Bulldog remains good law; the one outlier decision was issued by an out-of-District court, and, as Mr. Goldstein himself acknowledges, is currently on appeal. Sitting as the District Court, I am bound by the Second Circuit's holdings, and Mr. Goldstein’s arguments do not, and cannot, alter the Circuit's ruling in Bulldog.

In sum, under the Second Circuit’s established authority, authority that, it bears repeating, remains good law unless and until the appeals court reverses course and rules otherwise AMC and the plaintiffs had constitutional standing to raise the Section 16(b) claims in this settlement. Mr. Goldstein’s objection is thereby overruled.

Finally, the settlement furthers the congressional purpose

of forcing corporate insiders to disgorge short-swing trading profits. As aptly stated in AMC's papers, quote, "The proposed settlement gives AMC the most real and tangible of benefits: cold, hard cash, to be paid by wire within ten business days of a final, non-reviewable order of approval." Requiring the Antara Defendants to disgorge $3.3 million in cash under the terms of the settlement certainly advances the congressional purpose of Section 16(b).

In short, on balance, the factors I have just addressed strongly favor approval.

Having approved the settlement, I'm now going to turn to the portion of the settlement that concerns attorney's fees. While the parties correctly note that, under the circumstances here, the attorney's fees provided for under the proposed settlement may not even require Court approval, I have assessed the contemplated fees and find that the proposed award of $742,500 is reasonable.

Here, the $742,500 in the settlement agreement represents a contingency fee of 22.5% earned by AMC's Section 16(b) attorney James Hunter. To wit, the settlement terms do not require AMC to pay any fees out of its recovery other than that 22.5% fee, and Mr. Hunter has agreed to divide the fee evenly with plaintiffs' counsel. And, for the reasons stated in the parties' papers, I find that this fee was negotiated and agreed to in a transparent and good-faith manner, thereby eliminating

any possibility of collusion, and is fair to AMC in view of the additional fees, risk, and uncertainty AMC may have otherwise faced. Accordingly, I conclude that the proposed fee award is appropriate.

AMC has submitted a proposed order and final judgment. The Court will issue an order and final judgment shortly.

Is there anything else that anyone wishes to be heard on?

All right. Hearing nothing further, we are adjourned for today. Thank you, all.

I would like to get a transcript of this proceeding ordered. Has anyone done that? If you could order it and split the costs as you see fit, that would be helpful to the Court.

Thank you all. We are adjourned.

(Adjourned)